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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-251

DWIGHT J. LOVING, PETITIONER

v.

WILLIAM L. HART, COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, AND THE UNITED STATES OF AMERICA, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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IN THE

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October Term, 1998

No. 98-251

DWIGHT J. LOVING, Petitioner,

v.

WILLIAM L. HART, Commandant,
United States Disciplinary Barracks, and the
UNITED STATES OF AMERICA, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The United States maintains that this Court lacks jurisdiction to review the judgment of the United States Court of Appeals for the Armed Forces (CAAF). In addition, the United States argues that petitioner should be required to clear several procedural hurdles not previously addressed by CAAF. With respect to the merits of the questions presented, however, the United States asserts in conclusory fashion that petitioner's Eight Amendment Claims (Questions I & II) "do[] not warrant this Court's review." Brief in Opposition (BIO) at 9. Nowhere else in its brief does the United States address any non-jurisdictional reason why this Court should not grant certiorari on these questions. Indeed, the brief addresses the merits of the first two Questions Presented and only highlights

the need for this Court to grant certiorari to review several important issues critical to the constitutionality of the military death penalty. In addition, however, in raising the jurisdictional issues in the Brief in Opposition the United States has highlighted the need to add additional questions presented to address this Court's jurisdiction and the jurisdiction of the United States Court of Appeals for the Armed Forces.[1]

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1259(3).

The United States asserts incorrectly that "this Court lacks jurisdiction to hear petitioner's claim" under Section 1259. BIO at 9. Section 1259(3) provides that this Court may review decisions in "[c]ases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10." 28 U.S.C. § 1259(3). Section 867(a)(3) in turn, provides that "[t]he Court of Appeals for the Armed Forces shall review the record in all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused on good cause shown, the Court of Appeals for the Armed Forces has granted a review." 10 U.S.C. § 867(a)(3).

Petitioner first petitioned the United States Army Court of Criminal Appeals for extraordinary relief both under the All Writs Act, 28 U.S.C. § 1651 (a) and 10 U.S.C. § 866(b)(1), which grants jurisdiction for the court to review cases in which the sentence includes death. The Army Court summarily denied the petition on September 9, 1996. Petitioner then filed a writ appeal petition in the Court of

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[1]Due to this Court's page limitations, Petitioner will address only the jurisdictional questions with respect to Questions I and II although the government has also argued that this Court lacks jurisdiction to review Question III (command influence and illegal voting procedures).

Appeals for the Armed Forces seeking a writ under the All Writs Act and the court's mandatory review jurisdiction in death penalty cases, 10 U.S.C. § 867(l). The Court granted the writ appeal petition for review without citation to any statutory basis for its jurisdiction. *Loving v. Hart,* 46 M.J. 180 (1996) (Order).

The United States argues that CAAF did not review petitioner's claim under 10 U.S.C. § 867(a)(3). Likewise, the United States argues that Section 837(a)(3) applies only to cases on direct review, BIO at 9 (citing *Hendrix v. Warden,* 49 C.M.R. 146, 147 (C.M.A. 1974)), and that there is "no basis for concluding that Section 1259(3) permits this Court's review of a case in which jurisdiction in CAAF rested on the All Writs Act," BIO at 10. Nothing in the plain language of the statute, however, limits the section to direct appeals or excludes cases in which the Court of Appeals relies on the All Writs Act for its jurisdiction. Indeed, the language of the statute states specifically that CAAF has jurisdiction to review "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and for good cause shown, the Court . . . has granted a review." *See Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980) ("[a]bsent a clearly expressed legislative intention to the contrary," the language of the statute itself is "regarded as conclusive"). The court granted review in this case and, thus, clearly indicated a finding of "good cause shown" under Section 867(a)(3).[2]

The question under Section 867(a)(3) thus becomes whether, in denying the petition for extraordinary relief, the

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[2]The court of appeals' citation to the All Writs Act, 28 U.S.C. § 1651 (a), as its source of jurisdiction, *Loving v. Hart,* 47 M.J. 438, 441 (1998), does not change the fact that it also satisfied the requirements of 10 U.S.C. § 867(a)(3).

Army Court of Criminal Appeals "reviewed" the case. In its order, the Army Court indicated that it gave the petition "consideration."[3] Consideration" and "review" are synonymous. *See* Rogets Super Thesaurus 115 (1995). Likewise, the definition of review includes "consideration for purposes of correcting." Black's Law Dictionary 1186 (5th Ed. 1979). Thus, when the Army Court "considered" the petition, it "reviewed" the petition.

This Court recently reviewed an analogous situation in *Hohn v. United States,* 118 S. Ct. 1969 (1998). The question in *Hohn* was whether this Court has jurisdiction to review decisions of the court of appeals denying applications for certificates of appealability under the Antiterrorism and Effective Death Penalty Act of 1996, which amended the statutory provisions for habeas corpus. The amendments to 28 U.S.C. § 2253 provide, in pertinent part, "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals . . ." in habeas proceedings filed by state court prisoners under 28 U.S.C. § 2254 or by federal prisoners under 28 U.S.C. § 2255.

The court of appeals in *Hohn* had declined to issue a certificate of appealability. Hohn petitioned this Court for a writ of certiorari to review the denial of the certificate under 28 U.S.C. § 1254(l), which provides that this Court may review "[c]ases in the court of appeals" by writ of certiorari. Thus, this Court's jurisdiction turned on the question of

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[3]The order states in full: "Upon consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Motion for Oral Argument filed in the above case on 23 August 1996, the petition is DENIED. The Motion for Oral Argument is DENIED." *Loving v. Hart,* Army Misc. 9601437 (Army Crim. App. Sep. 9, 1996) (Order). The order incorrectly states that the petition was for a writ of mandamus. Petitioner actually sought a writ of habeas corpus "or other appropriate extraordinary relief."

whether an application for a certificate of appealability is within the class of " [c]ases in" the courts of appeals. 118 S. Ct. at 1972. This Court held that it was. In doing so, this Court rejected the argument that "a request to proceed before a court of appeals should be regarded as a threshold inquiry separate from the merits which, if denied, prevents the case from ever being in the court of appeals." *Id.* at 1974-75; *see also Nixon v. Fitzgerald,* 457 U.S. 731 (1982); *Ex Parte Quirin,* 317 U.S. 1 (1942). *Hohn* clearly holds that a lower court's summary dismissal or denial of a petition does not deprive this Court of jurisdiction.

This Court's jurisdiction in this case is even clearer than in *Hohn.* Here, the Army Court considered the case and CAAF actually granted review and denied relief on the merits rather than denying a petition for review, the equivalent of a certificate of appealability. Thus, because CAAF "reviewed" the Army Court's decision under 10 U. S.C. § 867(a)(3), this Court has jurisdiction under 28 U.S.C. § 1259(3).

II. THE COURT OF APPEALS AND THIS COURT HAVE JURISDICTION UNDER THE ALL WRITS ACT.

Even assuming that CAAF did not have jurisdiction under 10 U.S.C. § 867(a)(3) and this Court does not have jurisdiction under 28 U.S.C. § 1259, the lower court and this Court have jurisdiction under the All Writs Act, 28 U.S.C. § 1651 (a). Thus, this Court has jurisdiction to grant certiorari independent of Section 1259.[4]

Section 1651(a) provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs

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[4]The United States essentially acknowledges "some other source of authority to review the judgment below," BIO at 10, after attacking this Court's jurisdiction under 28 U.S.C. § 1259(3).

necessary or appropriate in aid of their respective jurisdictions. . . ." Indeed, this Court declared, in dicta, long ago, "we do not believe that there can be any doubt as to the power of the Court of Military Appeals to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court." *Noyd v. Bond,* 395 U.S. 683, 695 n.7 (1969).

The United States argues incorrectly, however, that CAAF had no jurisdiction to be "in aid of" because the case had become final under 10 U.S.C. § 871(c)(1)(C)(iii). BIO at 11. Section 871(c)(1) provides, in relevant part:

> If a sentence extends to death . . . that part of the sentence extending to death . . . may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate).

The section then establishes that a judgment is "final" after this Court's review. Section 871 (a), in turn, provides that a sentence of death "may not be executed until approved by the President." Thus, although a final legal judgment may have been reached on direct review, Private Loving's case is not "final," such that the military courts no longer have jurisdiction and the sentence can be executed, because the President has not yet approved the death sentence.

In addition, even if the case were final and the military courts no longer had direct jurisdiction over the case, the All Writs Act would still allow CAAF to exercise jurisdiction "in aid of" its function as "the primary source of judicial authority under the Uniform Code of Military Justice," H.R. Rep. 98-549, at 17 (1983), and the requirement that it review all cases in which a sentence of death is approved by a Court of Criminal Appeals, 10 U.S.C. § 867(a)(1). As this Court has recognized:

> [t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.

Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34, 43 (1985) (district court could not order U.S. Marshals Service to transport prisoners when the language of the applicable statute required the custodian of the prisoner to transport the prisoner to court).

Because there is no specific statutory provision and no contrary statutory provision, CAAF properly exercised habeas corpus jurisdiction under the All Writs Act. The argument of the United States to the contrary, BIO at 11, contradicts more than 20 years of lower court case law finding that CAAF has jurisdiction after the case becomes final under 10 U.S.C. §871. *See, e.g., Garrett v. Lowe,.* 39 M.J. 293, 295 (C.M.A. 1994); *Del Prado v. United States,* 48 C.M.R. 748 (1974). The lower court rules also reveal that a writ of habeas corpus is not barred due to finality under 10 U.S. C. § 871. *See* United States Court of Appeals for the Armed Forces, Rules of Practice and Procedure, Rule 19(d) ("a petition for a writ of habeas corpus or writ of error coram nobis may be filed at any time").

As the United States notes, this Court has granted review in *Clinton v. Goldsmith,* No. 98-347 (cert. granted, Nov. 2, 1998). Contrary to the government's implication, however, this Court did not generically grant review to determine whether CAAF has jurisdiction under the All Writs Act to grant a post-conviction claim. *See* BIO at 11-12. In *Clinton,* this Court granted certiorari review to determine whether CAAF had jurisdiction under the All Writs Act to bar the President from exercising his specific statutory, administrative authority to drop a convicted commissioned officer from the

rolls under 10 U. S.C. § § 1161 (b)(2) & 1167. *See* Petition at (1), *Clinton v. Goldsmith.*

This case presents a far different situation than *Clinton.* In *Clinton,* Congress specifically authorized the President to take the action prohibited by CAAF, whereas in *Loving,* no specific statutory provision contradicts CAAF's jurisdiction. Likewise, in *Clinton,* the underlying question is whether CAAF has jurisdiction over administrative personnel actions that are a collateral consequence of the court-martial rather than part of the sentence. *See Goldsmith v. Clinton,* 48 M.J. 84, 91 (1998) (Gierke, J.,with whom Crawford, J., joined, dissenting). In *Loving,* the death sentence is clearly a direct result of the court-martial and within the purview of CAAF's jurisdiction on direct appeal and in collateral review in "aid of its jurisdiction" under the All Writs Act. Nonetheless, if there is any doubt concerning CAAF's jurisdiction under the All Writs Act in this case, petitioner's case should be held pending the resolution of *Clinton.*

In any event, regardless of CAAF's jurisdiction under the All Writs Act, this Court itself has jurisdiction to grant the petition for a writ of certiorari under the All Writs Act. "The writ of certiorari under [28 U.S.C.] § 1651(a), generally described as the 'common law' writ, is not the same, jurisdictionally, as the writ of certiorari provided for . . . in the ordinary course of appellate review." Robert L. Stem, et. al., *Supreme Court Practice* 491 (7th ed. 1993). The common law writ under Section 1651 is thus "used to bring before the Court for review, in exceptional circumstances, otherwise non-appealable orders. . . ." *Id.* at 493. If this Court does not have jurisdiction under 28 U.S.C. § 1259 then CAAF's opinion in this case would constitute an "otherwise non-appealable" order which is susceptible to review under the common law writ of certiorari.

Before 1983, the prevailing view was that military justice cases did not fall under this Court's All Writs Act jurisdiction, thus preventing the issuance of such a common law writ. *See, e.g, Schlesinger v. Councilman,* 420 U.S. 738, 746 (1975) (Congress has "never deemed it appropriate to confer on this Court 'appellate jurisdiction to supervise the administration of criminal justice in the military"'). Since 1983, however, with the passage of 28 U.S.C. § 1259, military justice cases have fallen within this Court's potential jurisdiction. As one commentator has noted, "[I]t may be argued that because military courts are now under the jurisdiction of the Supreme Court, the Supreme Court may issue appropriate writs in aid of its jurisdiction pursuant to the All Writs Act." Scott A. Hancock, *Keeping a Perspective,* Army Law., Nov. 1988, at 24.

The case underlying the writ appeal at issue in this petition for writ of certiorari is certainly within this Court's jurisdiction and this Court has previously exercised that jurisdiction. *Loving v. United States,* 517 U.S. 748, 751 (1996). Indeed, the issues raised before CAAF and presented in the petition as Questions I and II were previously addressed in the oral argument before this Court, *see* Petition at 13-14, and in the Court's opinion, *id.* at 10-11. Thus, issuance of a common law writ of certiorari would be in aid of this Court's jurisdiction. Such a writ is, therefore, authorized under the All Writs Act.

CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment of the United States Court of Appeals for the Armed Forces. Any doubts concerning the jurisdiction of this Court under 28 U.S.C. § 1259(3) should be resolved by

adding a question presented to address jurisdiction.[5] Likewise, any doubts concerning the lower court's jurisdiction or this Court's jurisdiction under 28 U.S.C. § 1651 (a) should be resolved only after this Court decides *Clinton v. Goldsmith,* which is currently pending before the Court.

Respectfully submitted,

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[5]"The United States also argues that: (1) *Teague v. Lane,* 489 U.S. 288 (1989) (prohibiting application of a new rule or criminal procedure on collateral review of *state cases* in federal habeas proceedings) bars review in this case, BIO at 16; (2) a plain error rule should apply because no objection was made at trial, BIO at 16-17; and (3) petitioner should be required to establish "cause" for the alleged procedural default of not raising the issues underlying Questions I and II on mandatory review and "actual prejudice" from the omission, BIO at 17. None of these arguments has been previously addressed by this Court or the Court of Appeals for the Armed Forces (which did not discuss or find any procedural bar to addressing the merits) and should not be considered by this Court. Even if this Court were to consider these arguments, the fact that these arguments have never previously been addressed only highlights the need for this Court to grant the petition for a writ of certiorari and review these issues.